Supreme Court, U.S.
FILED
SEP 25 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-260

In The

Supreme Court of the United States

October Term, 1987

GENERAL DYNAMICS LAND SYSTEMS, INC.,
Petitioner,
v.
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA AND ITS LOCAL 1200,
Respondents.

GENERAL DYNAMICS LAND SYSTEMS, INC.,
Petitioner,
v.
WILLIAM E. BROCK, SECRETARY OF LABOR AND OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

JORDAN ROSSEN (P19679)* *General Counsel*
RALPH O. JONES (P15585) *Associate General Counsel*
INTERNATIONAL UNION, UAW
8000 East Jefferson Avenue
Detroit, Michigan 48214
(313) 926-5216
Counsel for Respondents
International Union, UAW and its Local 1200

* Counsel of Record

Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

QUESTIONS PRESENTED

I.

DOES A UNITED STATES COURT OF APPEALS ACT OUTSIDE OF ITS AUTHORITY WHEN IT CONSTRUES A STATUTE AND DETERMINES THAT THE AGENCY THAT ADMINISTERS THE STATUTE DID SO IMPROPERLY WHEN IT INTERPRETED AN AGENCY REGULATION SO AS TO NULLIFY A CLEAR AND UNAMBIGUOUS STATUTORY PROVISION?

II.

DOES A UNITED STATES COURT OF APPEALS ERR WHEN IT DECLINES TO DEFER TO AN ADMINISTRATIVE AGENCY DECISION WHERE THE AGENCY, WITHOUT ADEQUATE EXPLANATION, DEVIATES FROM ITS OWN PRECEDENT?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
INDEX OF AUTHORITIES	iii
OPINION BELOW	1
COUNTER-STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	4
I. THERE IS NO CONFLICT BETWEEN CIRCUITS.	5
II. THE PETITION PRESENTS NO FEDERAL LAW QUESTION SUFFICIENTLY IMPORTANT TO JUSTIFY GRANTING A WRIT OF CERTIORARI.	6
A. The Circuit Court Decision Does Not Raise The Issue Of Preemption. Rather, It Addresses The Issue Of Statutory Construction By An Administrative Agency.	7
B. The Court Of Appeals Properly Characterized The Commission's Decision As Arbitrary And Capricious.	10
CONCLUSION	12

INDEX OF AUTHORITIES

CASES:

Board of Governors v. *Dimension Financial Corp.*, 106 S.Ct. 681 (1986)	8
Brennan v. *Butler Lime and Cement Company*, 520 F.2d 1011 (7th Cir. 1975)	5, 6

Page

Con Agra, Inc., McMillan Company Division, 1983-84 O.S.H. Dec. (CCH) ¶ 26,420 11 OSHC (BNA) 1145 10-11

Federal Maritime Commission v. *Seatrain Lines*, 411 U.S. 726 (1973) 8

FTC v. *Colgate-Palmolive*, 380 U.S. 374 (1965) 8

Gulf States Utilities v. *FPC*, 411 U.S. 747 (1973) 11

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, et al. v. *General Dynamics*, 815 F.2d 1570 (D.C. Cir., April 14, 1987) 1-2, 3, 4, 7, 8, 9, 10, 11

National Realty and Construction Company, Inc. v. *OSHR 1973)* 6

NLRB v. *Babcock & Wilcox*, 351 U.S. 105 (1956) 9

NLRB v. *Brown*, 380 U.S. 278 (1965) 8-9

Usery v. *Marquette Cement Mfg. Co.*, 568 F.2d 902 (2nd Cir. 1977) 5

Volkswagenwerk v. *FMC*, 390 U.S. 261 (1968) 8

STATUTES AND REGULATIONS:

29 C.F.R. § 1910.1000(a)(2) 2

29 C.F.R. § 1910.1000(e) 2

29 C.F.R. § 1910.5(f) 2, 5, 6, 8

29 U.S.C. § 654(a)1 (§ 5(a)1 of CSHA "General Duty Clause") 2, 4, 9, 10

29 U.S.C. § 654(a)2 2

No. 87-260

In The

Supreme Court of the United States

October Term, 1987

GENERAL DYNAMICS LAND SYSTEMS, INC.,
Petitioner,
v.
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA AND ITS LOCAL 1200,
Respondents.

GENERAL DYNAMICS LAND SYSTEMS, INC.,
Petitioner,
v.
WILLIAM E. BROCK, SECRETARY OF LABOR AND OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR UAW AND ITS LOCAL 1200

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), and its Local 1200 [1], by counsel respectfully pray that the Court deny the Petition for Writ of Certiorari.

OPINION BELOW

The opinion below is reported at: *International Union, United Automobile, Aerospace and Agricultural Implement*

[1] Hereafter, jointly "UAW" or "Union".

Workers of America, et al. v. *General Dynamics*, 815 F.2d 1570 (D.C. Cir., April 14, 1987).

COUNTER-STATEMENT OF THE CASE

OSHA's "general duty clause" requires an employer to furnish each of its employees employment and a place of employment free from recognized hazards that cause or may cause an employee death or serious physical harm, § 5(a)1, 29 U.S.C. § 654(a)1. (Pet. 3). An employer is also required to comply with health and safety standards administratively promulgated by the Secretary of Labor. 29 U.S.C. § 654(a)2 (Pet. 3).

The Secretary has promulgated a specific safety standard governing an employee's eight-hour time weighted average exposure to the solvent "freon".[2] 29 C.F.R. §§ 1910.1000(a)(2) & (e) (Pet. App. B-18).The Secretary has also promulgated a regulation which deems an employer who is in compliance with an administrative safety standard to be in compliance with the general duty clause, but only to the extent the standard covers the safety condition, practice, means, method, operation or process. 29 C.F.R. § 1910.5(f). (Pet. 3).

In August 1982, General Dynamics instituted the use of freon as a solvent to clean up oil spills that occurred during its manufacture of M-1 Abrams tanks at the Detroit Arsenal Tank Plant, a Department of Defense facility.

Freon is a hazardous substance. Although less toxic than other commercial solvents, it evaporates quickly. In its gaseous state it is heavier than air and may cause serious illness or death. It tends to accumulate in

---

[2] Chemical disposition – 1,1,2 - Trichloro 1,2,2 - Trifluoroethane.

assembly-line pits and tank hulls, displacing oxygen and creating a risk of asphyxiation. In high concentrations it may also cause cardiac arrythmia and eventual arrest. 815 F.2d at 1571 (Pet. App. E-3).

Between August 1982 and November 13, 1983, numerous incidents were observed involving serious adverse employee reactions and symptoms during their use of and exposure to freon. One employee was overcome by fumes in August 1982 after entering an assembly-line pit containing freon vapors. 815 F.2d at 1572 (Pet. App. E-4). In March of 1983 another employee became dizzy and weak after driving a fully assembled tank in which freon had been poured. *Id.* at 1572 (Pet. App. E-5). A third employee became seriously ill and lost consciousness in the presence of a supervisor at the Plant's test track while sitting inside the driver's compartment of a tank after several gallons of solvent had been poured into its body. On September 21, 1983 an employee who was exposed to freon fumes when he entered a tank after pouring in approximately two gallons of solvent to clean a hydraulic leak was discovered by a fellow employee shaking and foaming from the mouth. In November 1983, yet another employee at a different General Dynamics plant died from exposure to solvent fumes. *Id.* at 1572, 1573 (Pet. App. E-4–E-6).

General Dynamics was cited by the Secretary for violation of the OSHA general duty clause and OSHA's specific standard governing employee exposure to freon on November 29, 1983. (Pet. App. A-1). The citation alleged, *inter alia*, that General Dynamics "did not furnish employment and a place of employment which were free from recognized hazards associated with exposure to solvent vapors in confined spaces requiring special entry procedures". (Pet. App. A-2, E-6).

After an 18-day hearing contesting the citation, an OSHA ALJ declined to rule on the evidence bearing on the alleged § 5(a)1 *statutory* violation, and dismissed that charge reasoning that the *statutory charge* had to be vacated because the hazard alleged was addressed by a specific standard. (Pet. App. C-12, E-6–E- 7).

The ALJ also dismissed the alleged violation of the specific standard for insufficient proofs. (Pet. App. C-20). The ALJ decision became a final order of the Occupational Safety and Health Review Commission on September 23, 1985. (Pet. App. D-1). The Secretary's and the UAW's petitions for review were consolidated in the Court of Appeals for the D.C. Circuit. (Pet. App. E-7).

On review of the Commission's final order, the District of Columbia Circuit vacated that portion of the order which dismissed the statutory charge, holding that the Commission's decision "vacating the statutory charge is not in accordance with law because it impermissibly construes regulations in a manner unauthorized by the clear and unambiguous language of the Act, and is arbitrary and capricious because it inadequately explains the Commission's failure to follow the holding of *Con Agra*". 815 F.2d 1570, 1579 (D.C. Cir 1987) (Pet. App. E-1–E-19). General Dynamics' Petition for Rehearing was denied *en banc* on June 18, 1987. (Pet. App. F-2).

REASONS FOR DENYING THE WRIT

Petitioner presents two questions for review. Both questions essentially challenge the Court of Appeals' authority to rule as it did. They may be restated, i.e., (1) Did the D.C. Circuit act without authority when it determined that the Commission was not authorized by statute to vacate the statutory charge of a general duty violation because a specific standard arguably addressed

the same hazard; and (2) Did the D.C. Circuit fail to give proper deference to the Commission's decision to vacate the statutory charge. General Dynamics argues both of their issues on the premise that the Secretary's regulation, 29 C.F.R. § 1910.5(f), and the Commission's interpretation of same, preempt an employer's general duty as specified in the statute.

General Dynamics has failed to demonstrate by its petition why this Court should exercise its discretion to review the decision below on either issue. While suggesting that the decision is both in conflict with those of other circuit courts (Pet. 9) *and* is of great public importance (Pet. 8), they fail to demonstrate that either is the case.

I.

THERE IS NO CONFLICT BETWEEN CIRCUITS.

Even if we accepted petitioner's assertion that the court below struck down the Secretary's preemption regulation (Pet. 8), which we do not, General Dynamics' conflict of circuits argument is totally lacking in substance. The three (3) relevant court of appeals decisions they cite are wholly inapposite. (Pet. 9). In neither of them was the question of preemption of the general duty clause by an OSHA regulation an issue before the reviewing Court, and neither of them ruled directly or indirectly on the issue.

In *Usery* v. *Marquette Cement Mfg. Co.*, 568 F.2d 902, 909 (2nd Cir. 1977), the court held that the Commission erred when it refused to allow the Secretary to amend the Complaint to charge the employer with a violation of the general duty clause in addition to a specific standard violation. *Brennan* v. *Butler Lime and Cement Company*, 520 F.2d 1011 (7th Cir. 1975) set aside a Commission decision

that vacated the Secretary's citation that was based only on an alleged violation of a specific standard under § 5(a)2 of the Act. *National Realty and Construction Company, Inc.* v. *OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973) reversed a Commission finding of a violation of the general duty clause because the record lacked substantial evidence of a violation.[3]

II.

THE PETITION PRESENTS NO FEDERAL LAW QUESTION SUFFICIENTLY IMPORTANT TO JUSTIFY GRANTING A WRIT OF CERTIORARI.

The decision below is scarcely of such public importance as General Dynamics maintains. To be sure, it leaves open the possibility that General Dynamics, on remand, could be found in violation of the OSHA general duty clause and thus expose certain General Dynamics' safety violations to public awareness. But that possibility merely leaves us with a routine judgment, vacating and remanding an administrative order with further instructions.

> We hold that part of the Commission's final order vacating the statutory charge (1) is not in accordance with law because it impermissibly

---

[3] Admittedly, both *Butler*, 520 F.2d 1017 n 9, and *National Realty*, 489 F.2d 1261 n 9, refer in dicta to the preemption regulation, 29 C.F.R. 1910.5(f). Neither of them rely on an interpretation of that regulation in the respective decisions. *Butler* simply cites *National Realty* without analysis. *National Realty* refers to the regulation for the proposition that specific standards preempt the general duty clause but, as in *Butler*, does not apply it to the decision. Even if it had, *National Realty*, being a decision from the same circuit as the decision below, does not satisfy the inter-circuit conflict normally deemed appropriate for grants of certiorari. As to the resulting potential for intra-circuit conflict, if any, General Dynamics' allegation of that was rejected below by the circuit, *en banc*. (See General Dynamics' D.C. Circuit Petition for Rehearing, p. 3; Pet. App. F-2).

> construes regulations in a manner unauthorized by the clear and unambiguous language of the Act, and (2) is arbitrary and capricious because it inadequately explains the Commission's failure to follow the holding of *Con Agra*. We therefore grant both petitions for review, vacate that part of the Commission's final order that vacates the section 5(a)(1) portion of the citation, and remand the cases to the Commission with instructions to address the merits of the section 5(a)(1) citation. [815 F.2d at 1579 (Pet. App. E-19)].

The decision itself raises no obviously important public issues.[4] It is not an erroneous statutory interpretation in conflict with existing Supreme Court precedent, and petitioner makes no such claim. It is, in fact, a decision on a point of law well-settled by this Court. Yet General Dynamics' principal argument is that the decision improperly struck down the Secretary's preemption regulation. We discuss the decision.

A. The Circuit Court Decision Does Not Raise The Issue Of Preemption. Rather, It Addresses The Issue Of Statutory Construction By An Administrative Agency.

Contrary to General Dynamics' assertion, the Circuit Court did not rule on the preemptive force of the Secretary's specific standard or the preemption regu-

---

[4] If found in violation, General Dynamics faces having to pay a modest fine. Had they been found guilty of both the statutory and the specific standard charges they might have paid $18,000. No other entity that uses freon in the same or similar way as General Dynamics has been identified by them so as to be directly affected by this decision. It is further our understanding that General Dynamics has discontinued the use of freon for tank cleaning purposes.

lation.[5] It did not have to. The circuit addressed the more basic issue of statutory construction and the legislative delegation of authority to the Secretary to promulgate rules inconsistent with the statutory command. It properly found such authority non-existent. 815 F.2d at 1576, 1577 (Pet. App. E-9).

Citing *Board of Governors* v. *Dimension Financial Corp.*, 106 S.Ct. 681 (1986), for the proper role of courts and administrative agencies when the meaning of statutory language is unmistakable, the D.C. Circuit says:

> if the statute is clear and unambiguous, that is the end of the matter, for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. [*Id.* at 686 (Pet. App. E-11)].

It is well settled that courts are the final authority on issues of statutory construction. *Federal Maritime Commission* v. *Seatrain Lines*, 411 U.S. 726, 745 (1973); *Volkswagenwerk* v. *FMC*, 390 U.S. 261, 272 (1968); *FTC* v. *Colgate-Palmolive*, 380 U.S. 374 (1965). They "are not obliged to stand aside and rubber stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully

---

[5] General Dynamics' suggestion that the Secretary's long-standing regulation, 29 C.F.R. § 1910.5(f) was struck down by the decision below is mere fancy. The court specifically notes that there "is no challenge before us to any OSHA regulation, but rather a challenge to the Commission's interpretation of particular OSHA regulations." 815 F.2d 1575 (Pet. App. E-10).

Moreover, nothing in the language of 29 C.F.R. § 1910.5(f) specifically refers to the word "preemption" or a modification thereof. Nor does the language authorize the use of a specific standard to relieve an employer of its general duty under OSHA. See Pet. p. 3.

review such administrative decisions". *NLRB* v. *Brown*, 380 U.S. 278, 291, 292 (1965). If the agency decision rests on an erroneous legal foundation, then courts must, of course, set them aside. *Id.* at 292, citing *NLRB* v. *Babcock & Wilcox*, 351 U.S. 105, 112, 113 (1956).

Here, the D.C. Circuit Panel's[6] examination of the Secretary's statutory authority to promulgate a rule that could abolish a statutory duty imposed by Congress on employers was not only proper but analytically necessary to reach a correct decision regarding the multiple positions of the parties asserted in the court below.[7] As that decision rightly concludes, "the Act does not empower the Secretary, and hence OSHA, to absolve employers who observe specific standards from duties otherwise imposed on them by the general duty clause". 815 F.2d at 1576 (Pet. App. E-13).

Judge Buckley reasoned that the unambiguous and expressed intent of Congress was to impose on employers a general duty for the safety of its employees under § 5(a)1 distinct from, and in addition to, the employer's duty to adhere to safety standards promulgated by the Secretary.

The decision emphasizes an employer's dual obligation under OSHA to comply with both the general statutory duty as well as specific standards promulgated by the

---

[6] Decision by Buckley, J., joined by Starr, J. and Robinson, C.J. U.S. District Court District of Columbia, sitting by designation.

[7] General Dynamics argued for preemption of the general duty by a specific standard and that deference should be accorded to the Commission's preempted decision. The Secretary and the UAW asserted that the specific standard did not address the general duty violation alleged and thus could not preempt such duty. They also argued that greater deference should be accorded the Secretary's decision to determine when there was a violation of the general duty and its decision to pursue enforcement than that accorded to the Commission's interpretation of the preemption regulation and the effect of the specific standard. 815 F.2d at 1574 (Pet. App. E-9, E-10).

Secretary. Moreover, the court recognized the absence of any need to rule on the preemption issue when it noted that, because the intent of Congress regarding the meaning of § 5(a)1 was so clear, it did not reach the issue of *deference*[8] to an OSHA standard or the so-called preemption regulation. 815 F.2d at 1575 (Pet. App. E-12).

Whatever preemption issue might have been raised had the court plunged into a consideration of deference to the Commission's interpretation of the Secretary's preemption regulation was avoided by Judge Buckley's scrupulous attention to, and decision regarding, the Congressional delegation issue. The D.C. Circuit, *en banc*, unanimously agreed with Judge Buckley that the issue here raised by General Dynamics was undeserving of further review. While clearly not dispositive of this Court's discretion to review the challenged decision, it certainly *suggests* the absence of any issue of great importance.

B. The Court Of Appeals Properly Characterized The Commission's Decision As Arbitrary And Capricious.

The court below characterized the Commission's decision as arbitrary and capricious because it inadequately explained its failure to follow existing agency precedent in *Con Agra, Inc., McMillan Company Division*, 1983-84 O.S.H. Dec. (CCH) ¶ 26,420, 11 OSHC (BNA) 1145 (1983). The court noted that the Commission in *Con Agra* had concluded that the general duty violation therein alleged was not covered by a specific standard. The Commission in *Con Agra* concluded that

---

[8] The preemption issue General Dynamics raises could legitimately exist only where there was a valid regulation that was challenged before the Court. As noted *supra*, n 4, there was no such preemption challenge.

> failure to test in a confined atmosphere before possible exposure of employees to toxic substances is a violation distinct from a continued exposure to known quantities of substances listed in section 1910.1000.

Thus, the Commission itself [in *Con Agra*] vacated an ALJ decision which had granted *Con Agra*'s motion to dismiss. 815 F.2d at 1578 (Pet. App E-17, E-18). Here, the Commission affirmed the ALJ.

Failing to discern any material difference between *Con Agra* and the circumstances of this case where General Dynamics was charged with sending its employees into tanks, tank hulls, and assembly-line pits that contained solvent vapors, it rejected the Commission's argument for distinguishing *Con Agra*. 815 F.2d at 1579 (Pet. App. E-19).

There is nothing novel or significant enough about this part of the lower court's decision to justify review. It is not at all unusual for a court, when reviewing an administrative decision, to reject that decision as arbitrary or capricious where the reasons for such a decision are inadequately explained. *Gulf States Utilities* v. *FPC*, 411 U.S. 747 (1973). Clearly, no issue sufficiently important to issue a writ is raised by this aspect of the decision.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari to the District of Columbia Circuit should be denied.

Respectfully submitted,

JORDAN ROSSEN (P19679) *
General Counsel
/s/ RALPH O. JONES (P15585)
Associate General Counsel

INTERNATIONAL UNION, UAW
8000 East Jefferson Avenue
Detroit, Michigan 48214
(313) 926-5216

Counsel for Respondents
International Union, UAW and its Local 1200

* Counsel of Record

Dated: September 24, 1987